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NEBUAD, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DAN VALENTINE, et al.,

Plaintiffs,

vs.

NEBUAD, INC., et al.,

Defendants.

No. C08cv-05113(TEH)(EMC)

**JOINT CASE MANAGEMENT
STATEMENT**

Date: June 28, 2010
Time: 10:00 a.m.
Hon. Thelton E. Henderson

Complaint Filed: November 10, 2008
Trial Date: None Set

1 Pursuant to Fed. R. Civ. P. 26(f), the parties met and conferred on June 17, 2010. The
2 telephonic conference was attended by:

- 3 • Scott A. Kamber and David A. Stampely of Kamberlaw, LLC, and Pete Kaufman of of
4 Panish, Shea & Boyle, LLP on behalf of Plaintiffs;
- 5 • Jason Kravitz and Talley McIntyre of Nixon Peabody LLP on behalf of Defendant,
6 NebuAd, Inc. (“NebuAd”) or “Defendant”);

7 In accordance with this Court’s standing order and Local Rule 16-9, the parties submitted
8 their original joint Case Management Statement on November 9, 2009, and now submit the
9 following updated report in preparation for the Case Management Conference scheduled for June
10 28, 2010, at which the parties will request the Court’s referral of this matter to a to a U.S.
11 Magistrate Judge for mediation. Currently, this Case Management Conference is scheduled in
12 conjunction with a hearing on a pending motion to dismiss on June 28, 2010 at 10:00 a.m. In
13 light of the ongoing settlement efforts and requested referral to a U.S. Magistrate Judge to assist
14 with mediation, the parties have filed under separate cover a joint stipulation requesting that the
15 hearing on the motion to dismiss be continued until after the close of mediation if the parties are
16 unable to reach settlement. The parties also requested in the joint stipulation that the Case
17 Management Conference be moved from 10:00 a.m. until 1:30 p.m. in accordance with the
18 Court’s Standing Order.

19 **1. Jurisdiction and Service**

20 All parties named in the action have been served.

21 **Defendant:** NebuAd does not challenge this Court’s exercise of personal jurisdiction
22 over it, and does not dispute that this Court has subject matter jurisdiction over the claims
23 asserted. NebuAd does not challenge the efficacy of service of the complaint.

24 **2. Facts and Contentions of the Parties:**

25 **Plaintiffs:** Plaintiffs allege that NebuAd is a California-based online advertising
26 company. Plaintiffs are citizens of Illinois, Montana, Alabama, Kansas, and Georgia.

27 The basis of Plaintiffs’ complaint is that NebuAd contracted with ISPs to monitor and
28 intercept without notice or consent the online communications of ISPs’ customers using an

1 intrusive and invidious technology known as Deep-Packet Inspection (“DPI”). By utilizing DPI,
2 Defendants are able to examine every search term entered, every item viewed, every email sent,
3 every credit card number entered in short, every click the users of ISPs make online. To do so,
4 NebuAd installed devices directly in the data hubs of ISPs and diverted all of the collected
5 subscriber data to NebuAd’s control, who utilized Deep Packet Inspection to alter impermissibly
6 senders’ communications being transmitted to Plaintiffs. Plaintiffs contend that these activities
7 violate the federal Electronic Communications Privacy Act (“ECPA”) and the Computer Fraud
8 and Abuse Act (“CFAA”), and state law claims pursuant to the California Invasion of Privacy
9 Act (“CIPA”) and California Computer Crime Law (“CCCL”), all prohibiting interference,
10 interception, and wiretapping of internet communications.

11 **Defendant:** This lawsuit arises out of a practice of using collected internet interaction
12 data for the purpose of delivering targeted advertisements based on consumer activity. NebuAd
13 worked with certain internet service providers (“ISPs”) to install devices on the ISPs’ networks,
14 which devices were capable of screening ISP subscribers’ internet activity. That data could
15 theoretically be used to sell advertising tailored to subscribers’ interests, in place of more generic
16 advertisements on web pages visited by subscribers.

17 Plaintiffs claim they are ISP customers whose online activities were allegedly monitored
18 during trials of this technology by NebuAd and certain ISPs. Plaintiffs claim this practice
19 violated federal and state statutes governing the privacy of communications and computer usage.

20 Plaintiffs filed a complaint on November 10, 2008 against NebuAd and certain ISPs,
21 alleging violations of the federal Electronic Communications Privacy Act of 1986, 18 U.S.C. §
22 2510 et seq.; California’s Computer Crime Law, Cal. Pen. Code § 502; the federal Computer
23 Fraud and Abuse Act, 18 U.S.C. § 1030; and California’s Invasion of Privacy Act, Cal. Pen.
24 Code § 630 et seq. Plaintiffs also charge ISPs with aiding and abetting the alleged statutory
25 violations and with civil conspiracy, and they assert an unjust enrichment claim against all
26 Defendants. NebuAd denies any and all wrongdoing and intends to put plaintiffs to their proof
27 should the parties fail to reach a settlement.
28

1 On October 6, 2009, the court granted the ISP Defendants' Motions to Dismiss for lack of
2 personal jurisdiction, leaving NebuAd as the lone remaining defendant in this action.

3 NebuAd had been struggling financially since before this action was filed. On May 13,
4 2009, NebuAd's board of directors executed an assignment for the benefit of creditors ("ABC"),
5 "a business liquidation device available to an insolvent debtor as an alternative to formal
6 bankruptcy proceedings." *Credit Managers Ass'n v. Nat'l Indep. Bus. Alliance*, 162 Cal. App. 3d
7 1166, 1169 (1984). The company's assets and documents have been assigned in trust to a
8 fiduciary assignee, NebuAd, LLC (the "Assignee"), which is to liquidate its assets to pay off
9 creditors. To share in the proceeds from the liquidation of NebuAd's property, creditors are
10 required to file notice of their claims with the Assignee.

11 **Joint Principal facts in dispute:**

- 12 • The amount of information NebuAd gathered from ISP subscribers for ad serving
13 purposes;
14 • The nature of information NebuAd gathered from ISP subscribers for ad serving
15 purposes;
16 • The manner in which NebuAd gathered information from ISP subscribers for ad serving
17 purposes;
18 • What notice was given to ISP subscribers regarding NebuAd's alleged gathering of
19 information;
20 • What level of consent was given by the ISP subscribers;
21 • What harm, if any, did any ISP subscriber suffer as a result of the conduct alleged in the
22 complaint.

23 **Defendant – Additional principal facts in dispute:**

- 24 • Plaintiffs' general internet habits relating to privacy and consent, i.e. whether they ever
25 granted consent to allow their data to be used by third parties and, if so, under what
26 circumstances.

1 **3. Legal Issues**

2 The parties agree that the issue of whether or not any class may be properly certified
3 under the requirements of Rule 23(b) is one of the primary issues in this case, and that other
4 issues include:

- 5 • Whether the federal claims in Plaintiffs' Complaint can be applied to the Defendant ISPs
6 for the conduct complained of;
- 7 • Whether NebuAd owed the ISP subscribers a duty to disclose the fact and nature of the
8 DPI allegedly conducted by the NebuAd device with respect to their internet
9 communications;
- 10 • Whether consumers consented to DPI inspection of their internet communications;
- 11 • Whether conduct complained of constitutes a violation of the Electronic Communications
12 Privacy Act ("ECPA") and the Computer Fraud and Abuse Act ("CFAA"), and state law
13 claims pursuant to the California Invasion of Privacy Act ("CIPA") and California
14 Computer Crime Law ("CCCL"), both as to NebuAd, and separately, as to the Defendant
15 ISPs;
- 16 • Whether Defendant has been unjustly enriched by its allegedly unlawful conduct;
- 17 • Whether Plaintiffs lack standing under the California Invasion of Privacy Act ("CIPA")
18 because they are not California citizens. *See* Cal. Pen. Code § 631(a); *Kearney v.*
19 *Salomon Smith Barney*, 39 Cal. 4th 95, 104, 107 (2006) (disapproving of attempt to apply
20 California's invasion of privacy law to protect non-California citizens).
- 21 • Whether Plaintiffs lack standing under the California Computer Crime Law ("CCCL")
22 because they are not California citizens. *See* Cal. Pen. Code § 502(a) ("The Legislature
23 further finds and declares that protection of . . . computer data is vital to the protection of
24 the privacy of individuals . . . and others *within this state* that lawfully utilize those
25 computers, computer systems, and data) (emphasis added).
- 26 • Whether the federal Electronic Communications Privacy Act ("ECPA") preempts
27 plaintiffs' CIPA and CCCL counts. *See Bunnell v. Motion Picture Ass'n of America*, 567
28 F.Supp.2d 1148, 1154 (C.D. Cal. 2007) (holding the ECPA preempted plaintiff's parallel

CIPA claim). The ECPA preempts parallel state laws such as the CIPA and the CCCL, expressly and by “field preemption.” *Id.*

- The appropriate remedies if the conduct alleged in the Complaint supports liability under any of the claims in the Complaint, including the propriety of any monetary and/or injunctive relief requested by the Plaintiffs.

4. **Motions:**

a. **Pending Motions** (excluding *pro hac vice* admission motions)

- 12/22/08 (DKT 4) – NebuAd’s Motion to Dismiss (this motion is still pending)

b. **Anticipated Motions:**

Plaintiffs: Should the parties fail to reach settlement, Plaintiffs intend to file the following motions: Leave to file amended pleading if consent is not obtained; class certification; dispositive motions at the appropriate time.

Defendant: NebuAd is not presently aware of any motions it specifically intends to file. Should the parties fail to reach a settlement, NebuAd also anticipates the filing of one or more dispositive motions at the appropriate time.

5. **Amendment of the Pleadings**

Plaintiffs: Plaintiffs informed Defendant in November 2009 that as a result of responsive discovery and developments in the case, they will seek leave to file an amended pleading within 30 days of filing the original Case Management Statement on November 9, 2009. Since that time, however, the parties have been engaged in good faith settlement negotiations, and Plaintiffs have not yet moved for leave to amend their pleadings.

Defendant: NebuAd does not presently anticipate amending its pleadings, but will of course respond to any amended pleadings filed by plaintiffs.

6. **Evidence Preservation**

Plaintiffs: Plaintiffs have sought preservation of all evidence and have a particular concern as a result of the status of the Defendant as well as the maintenance of electronic discovery.

1 **Defendant:** Upon information and belief, a litigation hold notice was sent to NebuAd
2 shortly after this action was commenced.

3 Shortly after current counsel was retained, they learned that a company called Red Aril,
4 Inc. (“Red Aril”) apparently acquired and took possession of certain NebuAd materials, possibly
5 including electronic records stored on computer servers. Current counsel immediately sent a
6 letter to Red Aril, requesting that it preserve any information obtained from NebuAd. Moreover,
7 on November 3, 2009, counsel for NebuAd served a Notice of Deposition and a Subpoena to
8 Testify at a Deposition on Red Aril. The subpoena was intended to ensure that Red Aril
9 preserves any NebuAd information in its possession. On December 17, 2009, Defendant deposed
10 Ray Avakian, Director of IT, Red Aril, Inc. regarding the asset transfer from NebuAd, Inc. to Red
11 Aril and the preservation efforts related to documents, records, and electronic data involved
12 during the asset transfer.

13 NebuAd does not have any information about what efforts, if any, have been made to
14 preserve potentially relevant information in the possession, custody or control of the plaintiffs,
15 including without limitation ESI.

16 **7. Disclosures**

17 As discussed at the November 10, 2009 Case Management Conference, Defendant served
18 its initial disclosures on December 18, 2009. Plaintiffs have not yet served filed initial
19 disclosures under F.R.C.P. 26(f).

20 **8. Discovery**

21 **a. Discovery Taken to Date.** On April 17, 2009, Plaintiffs served Special
22 Interrogatories Set One and Requests For Production (Set One) on NebuAd. On May 20, 2009,
23 NebuAd served responses and objections to this discovery. At the present time, Plaintiffs have
24 received approximately 6,600 pages of hardcopy documents. On November 3, 2009, counsel for
25 NebuAd served a Notice of Deposition and a Subpoena to Testify at A Deposition on Red Aril.
26 On December 17, 2009, NebuAd deposed Red Aril representative.

1 **b. The Scope of Anticipated Discovery.** In the event the parties fail to reach
2 settlement, the parties anticipate depositions, interrogatories, document requests, and other fact
3 and expert discovery available under FRCP and Local Rules.

4 **c. Proposed Limitations or Modifications to the Discovery Rules.** At the present
5 time, the parties do not anticipate limitations or modifications to the discovery rules.

6 **d. Proposed Discovery Plan Pursuant to Fed. R. Civ. P. 26(f).** Due to the ongoing
7 efforts to reach settlement, the parties have not yet agreed on the general parameters of a
8 discovery plan.

9 **9. Class Actions**

10 **Plaintiffs:** Plaintiffs provide the following class action information pursuant to L.R. 16-
11 9(b):

12 a. This action is maintainable as a class action under Fed. R. Civ. P. 23(a) and (b)(1),
13 (b)(2), and (b)(3).

14 b. The action is brought on behalf of the following Class initially defined as:

15 All Subscribers of ISPs utilizing NebuAd's services and whose internet
16 communications were monitored, intercepted, accessed, copied,
17 transmitted, altered and/or used at any time by or through a NebuAd
18 device.

19 c. The following facts alleged in the Complaint demonstrate that this action is
20 maintainable as a class action under Fed. R. Civ. P. 23(a) and (b):

21 **Numerosity** – While the precise number of Class members is unknown to Plaintiffs at
22 this time, Plaintiffs estimate that the Class consists of tens of thousands of members.

23 **Common Questions** – There are numerous common questions of fact and law. The
24 principal factual issues in dispute (Section 2 above) and points of law (Section 3 above) are
25 common to all Class members, and predominate over any questions affecting Plaintiffs or other
26 individual members of the Class.

1 **Typicality** – Plaintiffs’ claims are typical of those of the Class. Plaintiffs and all Class
2 members were subscribers of ISPs at the times in which and in the locations in which the
3 Defendant ISPs activated the NebuAd device that intercepted their internet communications.

4 **Adequacy** – Plaintiffs have no interests adverse or antagonistic to those of the Class and
5 have retained competent and experienced class counsel to prosecute the action.

6 **Superiority** – A class action is superior to all other available methods for the fair and
7 efficient adjudication of this controversy because joinder of all members is impracticable.
8 Furthermore, as the damages suffered by individual Class members may be relatively small, the
9 expense and burden of individual litigation makes it impossible for members of the Class to
10 individually redress the wrongs done to them. There will be no difficulty in the management of
11 this case as a class action.

12 Additionally, the Class may be certified because:

- 13 • The prosecution of separate actions by the individual members of the Class would create a
14 risk of inconsistent or varying adjudication with respect to individual Class members
15 which would establish incompatible standards of conduct for NebuAd and the Defendant
16 ISPs;
- 17 • the prosecution of separate actions by individual Class members would create a risk of
18 adjudications with respect to them that would, as a practical matter, be dispositive of the
19 interests of other Class members not parties to the adjudications, or substantially impair or
20 impede their ability to protect their interests; and
- 21 • NebuAd and the Defendant ISPs have acted or refused to act on grounds generally
22 applicable to the Class, thereby making appropriate final and injunctive relief with respect
23 to the members of the Class as a whole.

24 **d.** If the parties fail to reach settlement, barring substantial delays caused by
25 discovery disputes, Plaintiffs anticipate bringing a motion for class certification.

26 **Defendant:** Should the parties fail to reach a settlement agreement, NebuAd expects to
27 oppose any efforts to certify a class in this case, and subject to discovery, NebuAd expects to
28 challenge each of the factors relevant to class certification.

1
2 **10. Related Cases**

3 None.

4 **11. Relief**

5 **a. Plaintiffs:** Should the parties fail to reach a settlement agreement, Plaintiffs seek:

- 6 • An order certifying the Class, directing that this case proceed as a class action, and
7 appointing Plaintiffs and their counsel to represent Plaintiffs and the Class;
8 • Judgment in favor of Plaintiffs enjoining NebuAd from engaging in DPI inspection of
9 consumers' internet communications;
10 • Judgment in favor of Plaintiffs requiring NebuAd to cleanse all systems of all data
11 obtained through the NebuAd device and enjoin any party of third party from any use of
12 said data;
13 • Judgment in favor of Plaintiffs and Class members in an amount of actual damages,
14 compensatory damages, or restitution to be determined at trial;
15 • Judgment in favor of Plaintiffs and Class members for statutory damages in an amount to
16 be determined at trial;
17 • An order granting reasonable attorneys' fees and costs, as well as pre- and post-
18 judgment interest at the maximum legal rate; and
19 • Such other and further relief as this Court may deem appropriate.

20 **b. Defendant:** Should the parties fail to reach a settlement agreement, Defendant
21 seeks:

- 22 • Dismissal of the Complaint with prejudice and/or entry of judgment in favor of NebuAd;
23 • An award of its costs of suit and reasonable attorneys fees; and
24 • Other such relief as the Court deems just and appropriate.

25 If liability is imposed, NebuAd would defer to its expert witness(es) to formulate the
26 appropriate methodology for calculating damages, if any.
27
28

1 **12. Settlement and ADR**

2 The parties participated in a private mediation with JAMS. Plaintiffs and NebuAd remain
3 willing to continue that process. Since the initial Case Management Conference, the parties have
4 been diligently engaged in settlement discussions in person and by telephone. The negotiations
5 are multifaceted and involve the interests of parties and certain non-parties. The discussions have
6 included the parties themselves as well as the insurance carriers. However, after several months
7 of in-person and telephonic discussions and exchanges of draft agreements, the parties jointly
8 represent their belief that the parties have reached an impasse in settlement negotiations. The
9 parties believe that the intervention of the Court may facilitate resolution and jointly request
10 reference to a U.S. Magistrate Judge for mediation.

11 **13. Consent to Magistrate Judge For All Purposes**

12 The parties do not, at this time, consent to have a magistrate judge conduct all further
13 proceedings including trial and entry of judgment. However, NebuAd respectfully asks that it be
14 permitted to reserve the right to change its position in the future.

15 **14. Other References**

16 At this time, the parties do not believe this case is suitable for reference to binding
17 arbitration, a special master, or the Judicial Panel on Multidistrict Litigation.

18 **15. Narrowing of Issues**

19 Without the benefit of fact and expert discovery, the parties do not believe that the issues
20 can be narrowed at this time. Should the parties fail to reach settlement, after a ruling on the
21 anticipated motion to dismiss and appropriate discovery, the parties are willing to further meet
22 and confer regarding whether any narrowing of the factual or legal issues, including issues
23 related to class certification, can be achieved by way of voluntary agreement.

24 **16. Expedited Schedule**

25 The parties believe this case cannot be expedited at this point.
26
27
28

1 **17. Scheduling.** If the Court refers this matter to mediation which does not result in
2 resolution, the parties shall submit their proposed scheduling order within 14 days of the
3 termination of mediation.

4 **18. Trial**

5 The parties have requested trial by jury of all issues so triable. The parties estimate that a
6 trial would take approximately two weeks, but believe it is premature to schedule a trial date until
7 the Court rules on whether this case should be certified. After the Court has ruled on
8 Certification, the parties will reconvene and jointly submit a proposed trial date.

9 **19. Disclosure of Non-party Interested Entities or Persons**

10 a. **Plaintiff:** Plaintiffs did not disclose any persons or entities other than Plaintiffs
11 and Defendant.

12 b. **Defendant:** NebuAd filed the “Certification of Interested Entities or Persons”
13 required by Civil Local Rule 3-16 on April 15, 2009. (DKT 98). Pursuant to Civil L. R. 3-16,
14 NebuAd certified that the following listed persons, associations of persons, firms, partnerships,
15 corporations (including parent corporations) or other entities (i) have a financial interest in the
16 subject matter in controversy or in a party to the proceeding, or (ii) have a non-financial interest
17 in that subject matter or in a party that could be substantially affected by the outcome of this
18 proceeding:

19 **AXIS Surplus Insurance Company**

20 Identification of Connection/Interest: NEBUAD INSURANCE CARRIER

21 **St. Paul Travelers/St. Paul Fire & Marine Insurance Company**

22 Identification of Connection/Interest: NEBUAD INSURANCE CARRIER

23 In light of the ABC NebuAd executed in May 2009, NebuAd LLC and/or Sherwood
24 Partners LLC (the assignee(s)) should also be identified as a non-party interested entities.

25
26 **20. Other Matters**

27 At this time, there are no other matters that may facilitate the just, speedy, and
28 inexpensive disposition of this matter.

Respectfully submitted,

Dated: June 21, 2010

KamberLaw, LLC

By: /s/ David A. Stampley

DAVID A. STAMPLEY
Attorneys for Plaintiffs

Nixon Peabody LLP

Dated: June 21, 2010

By: /s/ Talley E. McIntyre

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GENERAL ORDER 45 CERTIFICATION

I, David A. Stampley, hereby attest pursuant to N.D. Cal. General Order No. 45 that the concurrence to the filing of this document has been obtained from each signatory hereto.

Dated: June 21, 2010

KamberLaw, LLC

By: /s/ David A. Stampley

DAVID A. STAMPLEY
Attorneys for Plaintiffs